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SUDHIR AK KUMAREN
v. INDUSTRIAL COURT OF MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
CHE MOHD RUZIMA GHAZALI JCA
AZMI ARIFFIN JCA
B AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: S-01(NCvC)(A)-659-09-2022]
13 MARCH 2025

C **Abstract** – *In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee unless waiver, estoppel or acquiescence is in issue. When the employer's conduct signals an intention to dismiss or remove the employee from his employment, breaching the implied term of mutual trust and confidence, such action goes to the root of the contract of employment. This renders the employment relationship untenable, thereby satisfying the 'contract test' for constructive dismissal.*

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E ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Application for – Award of Industrial Court – Employment – Constructive dismissal – Whether there was fundamental breach that went to root of employment contract – Ambiguity of employer's actions – Whether indicated severance of employment – Whether breached implied mutual trust and confidence – Whether there was intention to repudiate employment contract – Whether 'contract test' for constructive dismissal satisfied – Whether employer's conduct tantamount to constructive dismissal*

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LABOUR LAW: *Employment – Dismissal – Constructive dismissal – Whether there was fundamental breach that went to root of employment contract – Ambiguity of employer's actions – Whether indicated severance of employment – Whether breached implied mutual trust and confidence – Whether there was intention to repudiate employment contract – Whether 'contract test' for constructive dismissal satisfied – Whether employer's conduct tantamount to constructive dismissal*

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The second respondent was in the aviation industry, providing commercial flight services and training students to become helicopter pilots. By a letter
H of appointment dated 25 September 2014, the appellant was appointed as chief instructor by the second respondent. In 2016, the appellant's position as chief instructor was redesignated to Head of Training of the Flying Academy in line with the Malaysian Civil Aviation Regulations 2016. As at 13 October 2017, the appellant had accumulated 56 days of annual leave,
I which was equivalent to two years of his annual leave entitlement. The second respondent issued a letter to the appellant to utilise his earned leave as of 16 October 2017 until 14 January 2018, *ie*, over a spread of almost three months. In this letter, the second respondent specifically reserved its

right to review the appellant's employment with Layang-Layang Aerospace Sdn Bhd upon his return from leave. In the said letter of 13 October 2017 to the appellant, the second respondent also directed the appellant before he went on his leave to hand over his duties as head of training to Captain Idris Ismail who had been nominated by the second respondent as the acting head of training and to hand over the second respondent's assets, namely company's car, laptop computer, office keys (immediately) and all intellectual properties such as soft copies of all manuals. The second respondent also notified the appellant that as of 16 October 2017, he shall not authorise any flights on Layang-Layang Aerospace Sdn Bhd or assign any ground school duties to the staff of the second respondent and that the appellant's future employment with Layang-Layang Aerospace Sdn Bhd would be deliberated by the Board of Directors and the decision will be conveyed to the appellant when the appellant returned from his well-earned leave. By a letter dated 23 October 2017, the appellant wrote to the managing director, stating, amongst others (i) the following directives were not accepted as usual practice when a senior management staff as head of training goes on leave, namely, to hand over the company assets and not to give instructions to staff or students whilst the appellant was on leave; and (ii) for confirmation in writing that the appellant would continue to be employed in his position with the second respondent. As there was no reply from the second respondent in respect of the appellant's letter dated 23 October 2017, the appellant then wrote another letter dated 13 November 2017 to the second respondent, stating that as the second respondent had failed to respond to the appellant's letter, particularly to the appellant's queries pertaining to the status of his employment, the appellant considered himself constructively dismissed by the second respondent. The appellant accordingly commenced a suit at the Industrial Court for an award for constructive dismissal from his services without just cause or excuse and claimed reinstatement with loss of wages and other benefits. The Industrial Court dismissed the appellant's claim and, in its award, held that the second respondent's grounds did not amount to a breach by the second respondent or that they were sufficient to justify the appellant leaving his employment. Dissatisfied, the appellant commenced a judicial review of the said award of the Industrial Court. The High Court Judge ('HCJ') dismissed the judicial review application. Hence, the appellant's appeal herein. The issue for determination was whether the appellant was constructively dismissed.

Held (allowing appeal; setting aside order of High Court)
Per Azmi Ariffin JCA delivering the judgment of the court:

(1) In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee unless waiver, estoppel or acquiescence is in issue. Therefore, it was incumbent upon the appellant to establish that the second respondent committed a fundamental breach which went to the very root of the appellant's contract. By its letter

dated 13 October 2017, the second respondent had directed the appellant to go on leave from 16 October 2017 to 4 January 2018 and assigned his duties to another employee, to hand over the company's assets when going on leave and that his future employment with the company would be deliberated by the Board of Directors. This constituted a fundamental breach of his employment contract that evinced or signaled an intention on the part of the second respondent to dismiss or remove the appellant from his employment. These actions, when viewed cumulatively, went to the root of the contract of employment which rendered the employment relationship untenable, thereby satisfying the 'contract test' for constructive dismissal. The appellant's contention that the second respondent acted in bad faith as reflected in their letter dated 13 October 2017 constituted a breach of going to the root of the contract and was a reason for claiming constructive dismissal. (paras 36-40)

(2) The High Court, in affirming the Industrial Court's finding that the second respondent's letter which directed the appellant to go on leave and reallocated his duties did not indicate an intention to repudiate the contract, had not addressed the practical impact of removing the appellant's responsibilities, which undermined his role and authority and the contradiction between the reassignment of duties and the second respondent's claim that the appellant's employment remained secure. There was an appealable error in the findings of the High Court in affirming the decision of the Industrial Court. The appellant was instructed to take 56 days of leave, equivalent to two years of his annual leave entitlement. The conduct of the second respondent, in enforcing the appellant to take leave, tantamount to constructive dismissal in order to get rid of him from his services. (paras 46 & 47)

(3) While the appellant was on leave, he was directed to return all the second respondent's properties, which included the cars and also the computers that were supplied to the appellant during his employment. This action was indicative of the second respondent preparing to sever the employment relationship, rather than maintaining the *status quo*. (para 51)

(4) The letter dated 13 October 2017 certainly created uncertainty about the continuation of his employment with the second respondent. The destabilising impact of this ambiguity, reasonably undermined the appellant's confidence in the security of his position. The High Court did not address the second respondent's obligation to provide clarity and transparency regarding the appellant's position. The ambiguity created by the second respondent's actions breached the implied term of mutual trust and confidence. (para 54)

(5) The appellant acted reasonably by giving the second respondent three days to respond. When no response was received, the appellant resigned on 13 November 2017. The second respondent's failure to respond reinforced the impression that the appellant's position was uncertain and subject to unilateral change. The second respondent's silence and non-response to the 23 October letter seeking clarification of the status of employment reinforced the appellant's perception of repudiation which contributed to constructive dismissal. (para 57)

(6) There were contradictions in the second respondent's witness (COW1) testimony, where COW1 on the other hand, testified about reserving the right to transfer the appellant within the group of companies but on the other hand COW1 stated that the appellant remained the head of training at all material times. These statements were inconsistent, as the assertion of an active transfer process undermined the claim that the appellant's position was secure. The Industrial Court failed to reconcile these contradictions, yet the High Court uncritically affirmed its findings. Thus, there was insufficient judicial appreciation of the evidence by the HCJ which justified this court to interfere with his findings. (para 65)

(7) The 23 October 2017 letter explicitly requested the second respondent to confirm the appellant's continued employment. The appellant acted reasonably by giving the second respondent three days to respond. When no response was received, the appellant resigned on 13 November 2017. These actions demonstrated that the appellant was not unreasonably delaying his resignation but was attempting to resolve the matter amicably. The Industrial Court failed to appreciate that the second respondent's non-response to the clarification letter evinced an intention to repudiate the contract. This failure to respond directly influenced the appellant's decision to resign and could not be used to penalise him for the alleged delay. The HCJ failed to address the appellant's reasonable conduct and erroneously affirmed the Industrial Court's finding of undue delay. The resignation was directly linked to the second respondent's non-response, which confirmed the appellant's perception that the second respondent no longer intended to be bound by the employment contract. There was no delay in the appellant leaving his employment. The delay was caused by the second respondent's failure to respond to the appellant's letter, which left the appellant with no option but to resign after waiting for a reasonable period of time. Hence, there was a cause for the appellant to complain. (paras 77-81)

(8) The second respondent had exceeded its contractual rights by creating uncertainty and ambiguity about the appellant' s position. Clause 15 of the appellant's employment contract allowed for reassignment within the organisation. However, this right must be exercised reasonably and in good faith. The second respondent's conduct, including removing the

appellant's duties without clear justification had breached this clause. The second respondent's failure to provide clear communication about the appellant's role constituted a breach of trust and confidence. The constructive dismissal raised by the appellant was not a mere assumption, speculative in nature, vague or without concrete evidence. The appellant had successfully discharged the onus on him to prove that there was breach of the employment contract by the second respondent, which went to the root of the contract. The conduct of the second respondent in enforcing the appellant to take leave and return all the respondent's properties tantamount to constructive dismissal. (paras 84 & 86)

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***
Bayer (M) Sdn Bhd v. Anwar Abd Rahim [1996] 2 CLJ 49 HC ***(refd)***
Harpers Trading (M) Sdn Bhd v. National Union Of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***
Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***
Joseph v. Rey Lenferna Ltd [2008] SCJ 342 ***(refd)***
Malayan Banking Berhad v. Marcus Wong & Anor [2016] CLJU 1712; [2016] 1 LNS 1712 HC ***(refd)***
Malayan Banking Bhd v. Association Of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***
Murray v. Minister Of Defence [2008] 29 ILJ 1369 ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor [2017] 8 CLJ 159 CA ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***
Tan Lay Peng v. RHB Bank Bhd & Anor [2024] 6 CLJ 315 FC ***(refd)***
Western Excavating (ECC) Ltd v. Sharp [1978] 1 QB 761 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:

Civil Aviation Regulations 2016, reg. 72(4)
Industrial Relations Act 1967, s. 20

For the appellant - Ian Cham Chi Onn; M/s Ronny Cham & Co
For the 1st respondent - Absent
For the 2nd respondent - Sukumaran Vanugopal; M/s S Vanugopal & Partners

[Editor's note: Appeal from High Court, Kota Kinabalu; Judicial Review No: BKI-13NCvC-21-9-2020 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azmi Ariffin JCA:

Introduction

[1] Enclosure 1 dated 2 September 2022 is the appellant/applicant's notice of appeal to this Honourable Court against the Kota Kinabalu High Court decision given on 22 July 2022 in dismissing the appellant's application for judicial review with costs of RM10,000, subject to allocatur fees.

Background Facts

[2] The salient facts are as follows.

[3] Layang-Layang Helicopter Academy Sdn Bhd, the second respondent, is in the aviation industry, which is highly regulated under the law. Besides providing commercial flight services, the second respondent also trains students to become helicopter pilots. Its operations are governed by the relevant aviation laws, including the Civil Aviation Regulations 2016.

[4] The second respondent, with effect from 4 April 2018, changed its name from Layang-Layang Helicopter Academy Sdn Bhd to Layang-Layang Flying Academy Sdn Bhd.

[5] By a letter of appointment dated 25 September 2014, the appellant was appointed as a chief instructor by the second respondent and commenced employment effective from 1 October 2014.

[6] The salient terms and conditions of the employment, as stated in the letter of appointment, amongst others, provides that the appellant's basic salary was RM17,000 per month. In addition, thereto, appellant was also entitled to fix monthly transportation and fuel expenses of RM3,000 per month, cost of living allowance of RM100 per day and cost of instructional flight allowance of RM100 per hour.

[7] A detailed scope of duties and responsibilities for the position of head of training is stipulated in the second respondent's training and procedures manual.

[8] As the appellant was a non-resident of Sabah, his employment with the second respondent is subjected to a work permit issued by the Immigration Department at Kota Kinabalu which was renewed from time to time upon expiry.

[9] Sometime about 2016, the appellant's position as chief instructor was redesignated to Head of Training of the Flying Academy in line with the Malaysian Civil Aviation Regulations 2016.

[10] By the master services agreement dated 15 April 2016, the second respondent contracted with its parent company, Layang-Layang Aerospace Sdn Bhd to provide pilot services for chartered flights in terms of the said master agreement and the appellant, in addition to his duties as head of training carried out flights for Layang-Layang Aerospace Sdn Bhd for which he was paid flight allowance for undertaking the chartered flights at the rate of RM100 per flight hour.

[11] Layang-Layang Aerospace Sdn Bhd, which was a parent company of the second respondent, holds 80% of the shares in the paid-up capital of Layang-Layang Helicopter Academy.

[12] In September 2017, the appellant was instructed by the second respondent to provide training on Bell 206 aircraft to one Captain Idris bin Ismail, who joined Layang-Layang Aerospace Sdn Bhd.

[13] As at 13 October 2017, the appellant had accumulated 56 days of annual leave, which was equivalent to two years of his annual leave entitlement.

[14] The second respondent issued a letter dated 13 October 2017 to the appellant to utilise his earned leave as of 16 October 2017 until 14 January 2018, *ie*, over a spread of almost three months. In this letter, the second respondent specifically reserved its right to review the appellant's employment with Layang-Layang Aerospace Sdn Bhd upon his return from his leave.

[15] In the said letter of 13 October 2017 to the appellant, the second respondent also directed the appellant before he went on his leave to hand over his duties as head of training to Captain Idris bin Ismail who had been nominated by the second respondent as the acting head of training and to hand over the second respondent's assets, namely company's car (Wish SAA722N), laptop computer (ACER Aspire E14), office keys (immediately), all intellectual properties, *eg*, soft copies of all manuals *etc.* The second respondent also notified the appellant that as of 16 October 2017, he shall not authorise any flights on Layang-Layang Aerospace Sdn Bhd or assign any ground school duties to the staff of the second respondent and appellant future employment with Layang-Layang Aerospace Sdn Bhd will be deliberated by the Board of Directors and the decision will be conveyed to the appellant when the appellant return from his well-earned leave.

[16] The second respondent also issued an internal memorandum dated 23 October 2017 to all the staff notifying that the appellant will be on leave from 16 October 2017 till 14 January 2018 and requested the staff to assist the relief officer holding the post in acting capacity so that the Flying Academy's activities will be carried out without interruption. The said memorandum also notified that the appellant shall assume duty on his return from his leave.

[17] By a letter dated 23 October 2017, the appellant wrote to the managing director, namely, Mr Johan Poong Abdullah, stating, amongst others, as follows:

(i) to furnish the original letter/directive that was screenshot and sent to the appellant *via* WhatsApp message on 15 October 2017 by the Registrar, as the images were not visibly clear;

(ii) that the following directives were not accepted as usual practice when a senior management staff as head of training goes on leave, namely:

(a) to hand over the company assets such as the company vehicle, laptop computer, office keys and intellectual properties, *eg*, soft copies of all manuals *etc*; and

(b) not to give any instructions to staff or students whilst the appellant was on leave and have been barred from going online to check the student online training programmes and progress;

(iii) that the appellant's future employment with Layang-Layang Aerospace Sdn Bhd will be deliberated by the Board of Directors when, for all intents and purposes, his employment is with the second respondent and not with Layang-Layang Aerospace Sdn Bhd;

(iv) there was an intention by the second respondent to dismiss/remove the appellant from his employment; and

(v) for confirmation in writing that the appellant would continue to be employed in his position with the second respondent.

[18] As there was no reply from the second respondent in respect of the appellant's letter dated 23 October 2017, the appellant then wrote another letter dated 13 November 2017 to the second respondent's stating that as the second respondent had failed to respond to the appellant letter of 23 October 2017, particularly to the appellant's queries pertaining to the status of his employment. As a result, the appellant considered himself constructively dismissed by the second respondent effective from 13 November 2017.

[19] The appellant accordingly commenced a suit in the Industrial Court for an award for constructive dismissal from his services without just cause or excuse and claimed reinstatement with loss of wages and other benefits.

[20] The Industrial Court dismissed the appellant's claim and, in its award, dated 9 June 2020, held that the second respondent's grounds did not amount to a breach by the second respondent or that they were sufficient to justify the appellant leaving his employment.

[21] The appellant, being dissatisfied with the decision of the learned Industrial Court Chairman, commenced a judicial review of the said award of the Industrial Court.

[22] On 22 July 2022, the learned High Court Judge dismissed the judicial review application, hence the appellant's appeal herein.

The Relevant Provision Of Law

[23] Section 20 of the Industrial Relations Act 1967 provides as follows:

Representations on dismissals

20. (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:

Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

(4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

(5) This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of section 59 where proceedings have been commenced before a court in respect of an offence under subsection 59(1); where, while proceedings are pending under this section, proceedings arising out of the same dismissal are commenced before a court in respect of an offence under subsection 59(1), the proceedings under this section shall not be proceeded with further.

(6) In any proceedings under subsection (2):

(a) an employer may:

(i) represent himself or be represented by his duly authorized employee;

(ii) where he is a member of a trade union of employers, be represented by any officer or employee of such trade union employers; or

(iii) notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, be represented by any official of an organization of employers registered in Malaysia (not being a trade union of employers); and

(b) a workman may:

(i) represent himself;

(ii) where he is a member of a trade union of workmen, be represented by any officer or employee of such trade union of workmen; or?

(iii) notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, be represented by any official of an organization of workmen registered in Malaysia (not being a trade union of workmen).

(7) Save as provided in subsection (6), a workman or employer shall not be represented by an advocate, adviser, consultant or by any other person whatsoever.

(8) For the purpose of carrying out his functions under this section the Director General:

(a) shall have the power to direct either party to furnish to him, within such period as may be specified in that direction, such information as he may consider necessary or relevant; and

(b) may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the dismissals to attend a conference to be presided over by the Director General or such person as he may appoint at such time and place as may be specified in the direction.

(9) Where a workman who has made a representation under subsection (1) attends none of the conferences under paragraph (8)(b) without any reasonable excuse, the representation shall be deemed to have been withdrawn.

(emphasis added)

Summary Of The High Court Decision

(i) the burden is on the applicant to satisfy the first respondent (the Industrial Court) that the applicant was constructively dismissed by the second respondent.

(ii) the test to be applied in determining whether there was a constructive dismissal of an employee by his/her employer is that of a "contract test", that is whether the way the employer conducted himself towards the employee amounts to a breach going to the root or a fundamental breach of the contract of employment or shows that the employer no longer wanted to be bound by one or two of the essential terms of the contract of employment.

A (iii) the test for constructive dismissal is not whether the conduct of the employer towards the employee is unfair or unreasonable.

(iv) the applicant had failed to substantiate that the applicant was constructively dismissed by the second respondent.

B (v) the conducts of the second respondent in calling the applicant to go on leave from 16 October 2017 to 14 January 2018 (to clear the accumulated leave or for any reasons), in nominating Captain Idris bin Ismail to handle the applicant's duties and requesting the applicant to hand over the second respondent's car, laptop computer, office keys and intellectual properties and not to perform the tasks of authorising C any flights on registered helicopter of the parent company of the second respondent and assigned ground school duties to the second respondent's staff while the applicant cannot be say to be so inconsistent with the continuation of the employment of the applicant.

D (vi) the second respondent's letter dated 13 October 2017 stated that the applicant would be paid his monthly salary as usual under the contract of employment. The said letter also mentioned that the existing employment of the applicant with the second respondent would be considered by "the Board of Directors" which could be that of the E second respondent or its parent company.

(vii) the letter dated 13 October 2017 has not even suggested that a decision would be made definitely to transfer the applicant to the second respondent's parent company and thus the existing employment of the applicant with the second respondent was going to be terminated and F replaced.

(viii) a mere suggestion of the deliberation by the Board of Directors of the second respondent and/or its parent company regarding the future employment of the applicant with the parent company in the circumstances cannot be inferred to mean that the second respondent G had committed a fundamental breach of the contract of employment or there was intention on the part of the second respondent not to be bound by the essential terms of the contract of employment with the applicant.

(ix) the failure of the second respondent to reply to the letter dated H 23 October 2017 of the applicant within three days cannot be construed as if the second respondent had breached the fundamental terms of the contract of employment or applicant been dismissed from his employment or that he was constructively dismissed by the second respondent.

I (x) it cannot be said that the finding of the first respondent that there was undue delay on the part of the applicant in terminating the contract of employment following constructive dismissal as the applicant

asserted, is so outrageous or unreasonable that no reasonable trier of facts similarly circumscribed by the evidential materials before him/her would have made such a finding.

(xi) there was evidence that the second respondent had intended to transfer or re-designate the applicant and that the applicant's future employment which was to be deliberated by the Board of Directors. However, there was no evidence that the second respondent had decided to do so at the material time.

(xii) the finding of the first respondent that the applicant has failed to substantiate his assertion of having constructively dismissed by the second respondent is predominantly based on the first respondent's finding of facts which to a large extent depended upon the first respondent's assessment of the credibility of the witnesses that gave evidence before the first respondent.

(xiii) it is not for the court in an application for judicial review to interfere with the findings of fact by the first respondent merely because the court may come to different conclusions on facts on the basis of the same evidence.

(xiv) the applicant's application for judicial review is dismissed with cost a of RM10,000 be paid by the applicant to the second respondent subject to allocatur fee.

Approach In Judicial Review

[24] The role of the court in judicial review is to exercise a supervisory not appellate jurisdiction. Judicial review is not an appeal from a decision but a review of the manner in which the decision was made.

[25] In *Harpers Trading (M) Sdn Bhd v. National Union Of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417, the Supreme Court held:

(1) judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

(2) the Industrial Court in this case had heard evidence from both sides and it came to a decision exculpating Tan Seen Khow. It is not the function of the High Court in the exercise of its supervisory jurisdiction to hear a dispute *de novo* and decide it on its merits. This is not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come to.

[26] The Supreme Court in *Malayan Banking Bhd v. Association Of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183; [1988] 3 MLJ 204 at p. 186 (CLJ); p. 206 (MLJ), the Supreme Court said:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision maker has reached absurd results or reached results absurdly.

[27] In this regard, the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147, through a majority decision delivered by Eusoff Chin CJ (as he then was), had held as follows:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See, *eg*, *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
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> But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for process, but also for substance.

[28] In the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748, the Court of Appeal, through the judgment delivered by Gopal Sri Ram JCA (as he then was), held as follows:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a *quasi*-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision maker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account

relevant considerations (what may be conveniently termed an *Anisminic* error) or if he miscontrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

[29] In *Malayan Banking Berhad v. Marcus Wong & Anor* [2016] CLJU 1712; [2016] 1 LNS 1712; [2015] MLJU 1965, Ravinthran Paramaguru J (as he then was) held as follows:

It is trite law that the review jurisdiction of the High Court is different from appellate jurisdiction. completely unsupported by evidence. It will also not interfere merely because it may come to different conclusions on facts on the basis of the same evidence (see *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501). However, the decision of the Industrial Court can be examined for process as well as substance if the decision is affected by illegality, irrationality, procedural impropriety and proportionality (see the judgment of Edgar Joseph FCJ in *Ramachandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and the speech of Lord Diplock in *Civil Service Unions v. Minister for Civil Service* [1985] AC 374.

The Applicable Test In Constructive Dismissal Cases

[30] In *Tan Lay Peng v. RHB Bank Bhd & Anor* [2024] 6 CLJ 315, the Federal Court through the judgment delivered by Nordin Hassan FCJ, held as follows:

[18] It is a trite principle of law in Malaysia that the applicable test in constructive dismissal cases is the contract test and not the reasonableness test. The contract test is whether the conduct of the employer, in its action or series of actions, constitutes a fundamental or repudiatory breach that goes to the root of the employment contract or where the employer has evinced an intention no longer to be bound by the express or implied terms of the contract. Constructive dismissal is where the employee claims that he has been dismissed due to the employer's conduct. This can be said as "deeming dismissal" by the employer. The burden is on the employee to prove, on the balance of probabilities, that he has been constructively dismissed.

[19] The landmark case on the applicable test to prove constructive dismissal is the Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 where Salleh Abas LP (as he then was) refers the Court of Appeal case in England, *Western Excavation (ECC) Ltd v. Sharp* [1978] IRLR 27 which said this:

The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his

employer that the expression "constructive dismissal" was used. It must be observed that para. (c) never used the words "constructive dismissal". This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thoughts, and a few decisions were made, that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavation* (*supra*) reiterating an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd.* [1969] 3 All ER 1126) rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of para. (c) is a contract test. In his view, the Act draws a distinction between "dismissal", which is in one section, and "unfairness" which is in another section and moreover, the paragraph is using legal connotations, such as the words "notice" and "entitled".

Thus, it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

Turning back to our case under appeal, it is not enough for the learned Judge in the court below to say that constructive dismissal has no application to the interpretation of s. 20 of the Industrial Relations Act. He must go further and say which of the two alternative views on constructive dismissal has no application and if so, why? Whilst we think that "constructive dismissal" with unreasonableness test does not apply, it will be wrong for anyone to hold that "constructive dismissal" with contract test does not apply. Perhaps in the context of our law, it is better that we do not use the terminology at all. When the Industrial Court is dealing with a reference under s. 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para. (c) of s. 55(2) of the UK Protection of Employment Act 1978. Therefore, we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in

> UK should be introduced as an aid to the interpretation of the word "dismissal" in our s. 20. We think the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] Lloyd's LR 486).

[20] The application of the contract test for constructive dismissal in *Wong Chee Hong*'s case was endorsed by this court in *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181 and *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625. In *Petroliam Nasional* (*supra*), the court made the following observation:

> In the instant case, on a careful perusal of the award given by the Industrial Court, I am unable to detect any substantial flaws in its reasoning or the conclusions therein. In my view, the award contains a sound analysis of the law as to what constitutes constructive dismissal by an employer in line with the propositions postulated by Lord Denning MR in *Western Excavating (EEC) Ltd v. Sharp* [1978] 2 WLR 344 and by Tun Salleh Abbas LP in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [19881 1 CLJ 45; [19881 1 CLJ (Rep) 298. The Industrial Court had conducted a detailed review of all facts and evidence, both oral and documentary, presented by the disputing parties. It had drawn inferences from the conduct of the respondent and the relevant officers of the appellant. It then came to the conclusion that the appellant was not guilty of any breach which went to the root of the service contract nor had it evinced an intention not to be bound by it.

[21] The courts, to date, have been applying the contract test for constructive dismissal and not the reasonableness test. This can be seen in the following cases, *to wit*, *Ng Teck Fay v. Mahkamah Perusahaan Malaysia & Anor* [2021] 10 CLJ 73; [2021] 5 MLJ 574; *Keretapi Tanah Melayu Bhd v. Mohan Vythialingam & Anor And Another Appeal* [2023] 4 CLJ 532; [2023] 2 ILR 264; *Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon* [2023] 2 CLJ 34; *7-Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* [2023] 4 CLJ 895 and *CIMB Bank Bhd v. Ahmad Suhairi Mat Ali & Anor* [2023] 9 CLJ 345.

[22] In the *7-Eleven Malaysia Sdn Bhd* case (*supra*), the application of the contract test was reiterated where at p. 915, this was said:

> [28] As rightly observed by the judge at para. [16] of the grounds of judgment, the plaintiff's claim is for constructive dismissal. The concept of "constructive dismissal" is of course well-established in Malaysia. The *locus classicus* on constructive dismissal is the Supreme Court case of *Wong Chee Hong v. Cathay Organisation* Malaysia Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1988] MLJ 92 ("*Wong Chee Hong v. Cathay*").

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> [29] In the recent case of *Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon* [2023] 2 CLJ 34; [2022] MLJU 3174 ("Matrix"), the Court of Appeal considered the case of *Wong Chee Hong v. Cathay* and had the opportunity of examining the requisite legal test for constructive dismissal and the requirements in terms of the burden of proof. Essentially, the Court of Appeal in *Matrix* endorsed the trite proposition that the test for constructive dismissal is the "contract test" and not any unreasonable behaviour on the part of the employer. Thus, the conduct complained of must be repudiatory of the employment contract.

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[23] Next, in *Keretapi Tanah Melayu Bhd* (*supra*), the court re-affirmed the contract test and said the following:

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> [36] Further, in determining the issue of constructive dismissal, the contract test is applicable rather than the test of reasonableness. In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197, this court had re-affirmed the contract test in a constructive dismissal case and stated as follows:
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> D
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> > It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonable test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer be bound by the contract.'

E

[24] Thus, it is settled law that the applicable test for constructive dismissal cases is the contract test rather than the reasonableness test.

F

...

[30] Clearly, from the discussion and authorities cited above, the reasonableness of the employer's conduct is not the legal test for constructive dismissal. However, it can be a factor to be taken into consideration in determining whether there is any fundamental breach of the contract of employment by the employer. Further, the reasonableness

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of the employer's conduct *per se* is insufficient in establishing constructive dismissal. Its assessment must relate to the contract of employment and its fundamental or repudiatory breach.

...

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[45] Considering the current position of the law on constructive dismissal in Malaysia and other jurisdictions as alluded to above, as well as the discussion earlier, it is clear that the contract test in determining constructive dismissal is a good law and there is no reason to depart from the said position. To use the reasonableness test as the legal requirement or interchangeably with the contract test would only entail uncertainty

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and confusion in industrial relations. At the risk of repetition, we emphasise here that in Malaysia, the test for determining constructive dismissal of an employee is the contract test.

[46] As mentioned at the outset of this judgment, the appeal essentially concerned the applicable test in determining constructive dismissal. The Court of Appeal found that the Industrial Court had applied the wrong test of reasonableness rather than the contract test in deciding the constructive dismissal of Mr Tan. As such, the respondent's appeal was allowed. At para. 45 of the Court of Appeal's grounds of judgment, this was said:

> [45] Based on its reasoning above, *the Industrial Court had clearly gone in the bona fide and reasonableness of the appellant's conduct instead of considering whether there was a breach of contract* when the appellant was transferred by the respondent to GIB.
>
> [46] In the light of the authorities which we have already referred to above, we are satisfied that *the Industrial Court had erred in law in failing to apply the proper legal test in a case of constructive dismissal*.
> ...

[50] In the circumstances and based on reasons alluded to earlier, the answer to the leave question is as follows:

> There is a difference between the contract test and the reasonableness test. The appropriate test for determining a constructive dismissal case is the contract test. The reasonableness of the employer's conduct is a factor that may be taken into consideration in determining whether there is any fundamental breach of the contract of employment or an intention no longer to be bound by the contract.
>
> (emphasis added)

[31] Gopal Sri Ram JCA (as he then was) in *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 at p. 19 described "constructive dismissal" as follows:

> A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a "constructive dismissal". There is no magic in the phrase. It simply means this.
>
> An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong* (*ibid*). Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[32] The High Court in *Bayer (M) Sdn Bhd v. Anwar Abd Rahim* [1996] 2 CLJ 49; [1995] MLJU 558 held that for an employee to succeed in his constructive dismissal claim, he must satisfy the following four conditions discerned from the Supreme Court decision in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1988] 1 MLJ 92:

(a) that there must be a breach of contract by the employer;

(b) that the breach must be sufficiently important to justify the employee leaving his employment;

(c) that the employee must leave his employment in response to the breach and not for any other unconnected reasons; and

(d) he must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

It is trite that if an employee leaves the employment of the employer, without the above conditions, being fulfilled, he will be deemed to have resigned and there will be no dismissal within the meaning of the relevant legislation at all. (See *Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1988] 1 MLJ 92.

[33] It is interesting to note that the Court of Appeal of South Africa formulated the test for constructive dismissal under the common law in *Murray v. Minister Of Defence* [2008] 29 ILJ 1369 as follows:

> The employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

Appellant's Ground Of Appeal

(i) the learned High Court Judge had seriously misdirected himself on the law in respect of constructive dismissal, in particular, the "contract test". The learned High Court Judge in doing so failed to appreciate the actions and/or conduct of the second respondent leading up to the termination of the appellant's employment.

(ii) the learned High Court Judge had seriously misdirected himself on the law in respect of "*Wednesbury* unreasonableness" by failing to appreciate that the court in an application for judicial review is not confined to merely examining the decision-making process, but is empowered to examine the merits of the decision itself.

(iii) in furtherance of item (ii) hereinabove, the learned High Court Judge had erred in law and in fact by stating that it is not for the court in an application for judicial review to interfere with the finding of facts by the learned Industrial Court Judge. The learned High Court Judge, in finding so, failed to consider that there are erroneous findings of facts by the learned Industrial Court Judge based on the affidavits filed in the judicial review proceedings. In particular, the learned High Court Judge erred in affirming the first respondent's finding on the credibility of the second respondent's sole witness, in spite of the contradictory evidence given by the said witness.

(iv) the learned High Court Judge had erred in law and in facts by affirming the first respondent's finding that there was an undue delay in the appellant terminating his contract of employment. The learned High Court Judge erroneously affirmed the first respondent's computation of time from 13 October 2017 in determining if there was an undue delay by the appellant in terminating his contract of employment, when it was the appellant's contention at all material times that he only considered himself to be constructively dismissed on 13 November 2017, *ie*, after the second respondent failed to respond to the appellant's letter dated 23 October 2017 seeking clarification on the status of his employment. The learned High Court Judge erred in law and in facts by failing to appreciate that the appellant had taken immediate steps in terminating his employment within a reasonable time, which included his letter to the second respondent to clarify his employment status.

(v) the learned High Court Judge had erred in law and in facts by finding that the issue on the limits of the right of the second respondent to transfer and/or re-designate the appellant did not arise as "there was no evidence that the second respondent had decided to do so at the material times". This runs contrary to the evidence produced in court, where the second respondent's own witness in fact provided such evidence through his testimony in the Industrial Court proceedings.

Sole Issue For Determination

[34] Whether the appellant was constructively dismissed.

Our Decision

Ground 1: Misapplication Of Constructive Dismissal "Contract Test"

[35] Learned counsel for the appellant submitted that the learned High Court Judge failed to appreciate the actions and conduct of the second respondent leading to the appellant's termination. In addition, the learned High Court Judge had not properly assessed whether the second respondent's actions (forced leave, surrender of assets, ambiguity regarding employment status) constituted a fundamental breach of the contract.

A **[36]** In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee unless waiver, estoppel or acquiescence is in issue. Therefore, it was incumbent upon the appellant to establish that the second respondent committed a fundamental breach which went to the very root of the appellant's contract.

B **[37]** The Industrial Court Chairman came to a finding of fact based on the credibility of witnesses that the appellant had failed to discharge the necessary burden that he had been constructively dismissed. The High Court entirely agreed with the Industrial Court findings. However, there are cogent reasons to disturb the finding of facts made by the learned Chairman in this
C regard.

[38] By its letter dated 13 October 2017, the second respondent directed the appellant to go on leave from 16 October 2017 to 4 January 2018 and assigned his duties to another employee, to hand over the company's assets when going on leave, not to give instruction to staff or students while on
D leave and that his future employment with the company will be deliberated by the Board of Directors constituted a fundamental breach of his employment contract that evinced or signalled an intention on the part of the second respondent to dismiss or remove the appellant from his employment.

E **[39]** The appellant asserts that these actions, when viewed cumulatively, went to the root of the contract of employment and rendered the employment relationship untenable, thereby satisfying the "contract test" for constructive dismissal.

[40] We agreed with the submission of learned counsel for the appellant.
F From the documentation and evidence before us and applying the contract test, the appellant's contention that the second respondent acted in bad faith as reflected in their letter dated 13 October 2017 constituted a breach of going to the root of the contract and be a reason for claiming constructive dismissal.

G **[41]** For convenience, it would be useful and beneficial to consider the collective effect of these actions, and we shall do so now:

Directive To Go On Leave

[42] Learned counsel for the second respondent argued that the appellant
H had accumulated 56 days of annual leave, which was equivalent to two years of his annual leave. The appellant himself testified at the trial that he had not taken leave for three years. By its letter dated 13 October 2017, the second respondent directed the appellant to go on leave from 16 October 2017 to 14 January 2018 and assigned his duties to another employee was for obvious
I reason and justified.

[43] More so, the second respondent further said that a person like the appellant who had not taken leave for three years is more likely to suffer from fatigue than one who has regularly taken leave. It is common sense that the safety of an aircraft and its passengers would be compromised if the pilot is fatigued. The appellant was not only the head of training of the Academy but also undertook commercial chartered flights for the parent company, Layang-Layang Aerospace Sdn Bhd. It is obligatory for the second respondent to ensure that the appellant was sufficiently rested so as to eliminate the potential danger to the aircraft or its passengers caused by the appellant's fatigue. Hence, the second respondent's directive to take his annual leave was in line with the statutory requirement under the said Act.

[44] This rationale for leave is more compelling in the aviation industry. Regulation 72(4) of the Civil Aviation Regulations 2016, which stipulates as follows:

> (4) The operator shall take all steps reasonably practicable to ensure that every person flying in the aircraft as a member of its crew complies with the fatigue management scheme.
>
> (5) The operator shall not cause or permit any person to fly as a member of its crew if the operator knows or has reason to believe that the person is suffering from, or, having regard to the circumstances of the flight to be undertaken, is likely to suffer from, such fatigue while so flying that may endanger the safety of the aircraft or its occupants.
>
> (please see Regulation 72(4) at pages 393 and 394, Record of Appeal Volume 2(2)).

[45] However, on the other hand, the appellant in the present case claimed that he was not fatigued or stressed despite not having taken leave for three years. In his affidavit in support affirmed on 1 September 2020, he said as follows:

> (h) the first respondent failed to consider that the second respondent's intention in compelling me to go on leave on grounds that I was irritable, quarrelsome, brash, stress and fatigued was not supported by any documentary evidence whatsoever and neither did the second respondent explain the metrics that was utilized in determining that I was fatigued. In any event, the first respondent failed to consider that the grounds compelling me to go on leave was only raised for the first time during the proceedings before the first respondent and therefore clearly an afterthought. Therefore, the second respondent's conduct was clearly an act of disguise to frustrate me out from my employment by directing me to hand over the second respondent's assets and by forbidding me to give any instructions to the staff and students whilst on leave.

[46] We agreed with the appellant's contention. The Industrial Court found that the second respondent's letter dated 13 October 2017, which directed the appellant to go on leave and reallocated his duties, did not indicate an

intention to repudiate the contract. The High Court affirmed this finding without addressing the practical impact of removing the appellant's responsibilities, which undermined his role and authority and the contradiction between the reassignment of duties and the second respondent's claim that the appellant's employment remained secure.

[47] Upon deliberation, we find that there is an appealable error in the findings of the learned High Court Judge in affirming the decision of the Industrial Court Chairman. From the facts of the case, the appellant was instructed to take 56 days of leave, equivalent to two years of his annual leave entitlement. We are of the considered view that the conduct of the second respondent in enforcing the appellant to take leave tantamount to constructive dismissal in order to get rid of him from his services.

[48] COW1 provided reasons for the second respondent's actions (*eg*, concerns about fatigue and Civil Aviation Regulations). Unfortunately, these reasons were not contemporaneously communicated to the appellant but surfaced only during the Industrial Court proceedings. This after-the-fact reasoning undermined the reliability of Johan Poong Abdullah's (COW1) testimony or credibility and constituted an afterthought to justify earlier actions.

Demand For Return Of Company Property

[49] The same letter demanded the appellant to return his laptop, office keys, and other company assets. The directive to the appellant to take his leave of 56 days from 16 October 2017 to 14 January 2018 was spread over 91 days or three months. The second respondent argued that this action is not to sideline his role as head of training, undermining his position and authority. As three months was a relatively long period, it was necessary and a logical move for the second respondent to instruct the appellant to hand over the company car and computer so that they would be used by others carrying out his role during the three months. The said benefits, however, were not taken away from the appellant permanently since he still remained as an employee of the second respondent.

[50] It was further contended that it was also necessary for the appellant to hand over his duties as head of training to another employee, *ie*, Captain Idris bin Ismail, so that the second respondent can continue with its operations when the appellant is on leave without interruption to the training of the students at the Flying Academy. Hence, the second respondent did not breach any of the terms of the appellant's employment as provided under his employment contract.

[51] With respect, we disagree. While the appellant was on leave, he was directed to return all the second respondent's properties, which include the cars and also the computers that were supplied to the appellant during his employment. This action is indicative of the second respondent preparing to sever the employment relationship, rather than maintaining the *status quo*.

Future Employment

[52] Learned counsel for the second respondent argued that the statement by them in the said letter dated 13 October 2017 that the appellant's future employment with Layang-Layang Aerospace Sdn Bhd shall be deliberated by the Board of Directors upon his return from leave did not go to the root of his employment contract evincing an intention not to be bound by the terms of the contract.

[53] The learned judge in relation to the above matter found at paras. [14] to [18] that the letter did not even suggest that a decision would definitely be made to transfer the appellant to the parent company and that his existing employment with the second respondent would certainly end particularly in view of the provisions of the contract of employment that provided for the appellant's transfer within the organisation or group of companies. The second respondent has the managerial prerogative to transfer its staff to any other positions within the second respondent or Layang-Layang Group of Companies. The right of transfer is also expressly stated in cl. 15 of the appellant's letter of appointment dated 25 September 2014 at p. 415, record of appeal vol. 2(3), which states that:

> The management reserves the right to transfer you to other position within organization or group of companies

[54] With respect, we beg to differ. The letter dated 13 October 2017 certainly created uncertainty about the continuation of his employment with the second respondent. The destabilising impact of this ambiguity, reasonably undermined the appellant's confidence in the security of his position. The High Court did not address the second respondent's obligation to provide clarity and transparency regarding the appellant's position. The ambiguity created by the second respondent's actions breached the implied term of mutual trust and confidence.

[55] Consequently, the second respondent's contention is without merit.

Failure To Respond To The Appellant's Clarification Letter (23 October 2017)

[56] The second respondent argued that they have no obligation to respond to the appellant's letter as he ought to be aware that the matter of confirmation of the appellant in his employment is the prerogative of the second respondent and he himself had voluntarily walked out of his employment on 13 November 2017 when he failed to report for duty on 15 January 2018 after his leave. Thus, failure to reply to the appellant's letter of 23 October 2017 does not constitute a breach of a fundamental term of the appellant's contract of employment.

[57] We find no merit in the second respondent's argument. The appellant acted reasonably by giving the second respondent three days to respond. When no response was received, the appellant resigned on 13 November

2017. The second respondent's failure to respond reinforced the impression that the appellant's position was uncertain and subject to unilateral change. The second respondent's silence and non-response to the 23 October 2017 letter seeking clarification of status of employment reinforced the appellant's perception of repudiation which contributed to constructive dismissal.

Ground 2: Wednesbury Unreasonableness

[58] The appellant argued that the learned judge erred in law by failing to properly apply the principles of *Wednesbury* unreasonableness in reviewing the Industrial Court's decision. Judicial review requires the court to assess whether the decision was so unreasonable that no reasonable decision-maker could have reached it. The High Court misdirected itself by unduly limiting the scope of review to procedural aspects and failing to address the substantive merits of the Industrial Court's findings.

[59] In addition, the learned counsel for the appellant submitted that the Industrial Court's decision meets the threshold of *Wednesbury* unreasonableness because:

(i) outrageous defiance of logic:

It defies logic to find that the second respondent's conduct, including forced leave and ambiguous statements about future employment, did not constitute a breach of the employment contract. A reasonable decision-maker would have recognised that these actions were inconsistent with the continuation of the employment relationship.

(ii) failure to apply accepted standards of justice:

The Industrial Court failed to weigh the appellant's evidence fairly, particularly the 23 October 2017 letter seeking clarification of his employment status. The High Court's deference to the Industrial Court's findings perpetuated this injustice, rendering the decision unsustainable.

[60] In this context, the learned Chairman concluded her findings, *inter alia*, as follows:

> [28] Having scrutinised all the evidence presented before it, the Court finds the Claimant has failed to substantiate his assertion. On the other hand, the Company had produced evidence to justify the instructions given to the Claimant. The Court also finds COW1's testimony credible.
>
> The Court particularly finds no reason to doubt COW1's evidence that the Company had wanted the Claimant to remain with the Company. The Court finds his explanation reasonable that the Claimant was intended to replace the foreign pilot as the Chief Pilot in the parent Company, Layang-Layang Aerospace Sdn Bhd. Hence the Court finds the Claimant has failed to show the Company had wanted to terminate his service.

[29] Having considered the arguments raised by both the Claimant and the Company, and all the evidence before it, the Court finds the Claimant had failed to fulfil the four elements in the Supreme Court decision in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92.

The Court is not satisfied that there was a breach of contract by the Company. If at all there was a breach, it was not sufficiently important to justify the Claimant leaving his employment. In addition, the Court does not find any evidence to show that the Claimant left his employment in response to the breach or for any other unconnected reasons. Finally, the Court finds there was undue delay in the Claimant terminating the contract, *ie*, one month after the 13 October 2017 letter that he had claimed to indicate the Company's intention. It was only on 13 November 2017 that the Claimant had written to Company claiming constructive dismissal. Instead the Court deems his absence from work as abandonment of his employment with the Company. Therefore, the Court finds his claim for constructive dismissal unwarranted.

[30] It cannot be over emphasised that the Industrial Court, in deciding disputes brought before it, is guided by equity, good conscience and substantial merits of the case without regard to technicalities and legal form. In addition, the Court also took guidance from the cases discussed above. Hence having been guided as such, the Court considered all the facts and evaluated the totality of the evidence and finds for the Company and the Claimant's claim is hereby dismissed.

(emphasis added)

[61] With respect to the finding of the credibility of the second respondent's witnesses (COW1), the learned judge, however, at paras. 34 & 35 of his judgment had this to say:

34. Thus, in respect of the 3rd ground of the applicant that first Defendant had erred in holding that the second Respondent's witness (COW1) was credible, that is a matter of preference of the first Defendant for the version of case as testified by second Respondent's witness (COW1) to that of the applicant based on the first Respondent's assessment of their evidence and their demeanours which the first Respondent has the opportunity to observe.

35. I am not persuaded that the first Respondent's finding that the first Respondent's witness (COW1) was credible and the preference for the version of the case as given by the first Respondent's witness (COW1) is perverse or so unreasonable that a reasonable trier of facts similarly circumscribed or circumstanced by the evidential materials before the first Respondent, would not have made.

[62] In determining the issue of constructive dismissal, the learned judge rightly applied the contract test and not the reasonableness test when the learned judge in his grounds of judgment at p. 16 (record of appeal vol. 1(1)) said the followings:

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3. There is no controversy that the test to be applied in determining whether there was a constructive dismissal of an employee by his/her employer is that of a "contract test" that is whether the way the employer conducted himself towards the employee amounts to a breach going to the root or a fundamental breach of the contract of employment or shows that the employer no longer wanted to be bound by one or two of the
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essential terms of the contract of employment.

4. The test is not whether the conduct of the employer towards the employee is unfair or unreasonable. See: *Western Excavating (ECC) Ltd. v. Sharp* [1978] 1 All ER 713 as adopted in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ (Rep) 298; [1988] 1 CLJ (Rep) 298;
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and *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197.

[63] Having scrutinised the High Court's grounds of judgment in totality, read the full transcript of the oral evidence of witnesses as well as taking into account the contemporaneous documentary evidence and the submissions at the High Court we found that though the learned judge had adopted the
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contract test to determine whether the way the employer conducted himself towards the employee amounts to a breach going to the root or a fundamental breach of the contract of employment or shows that the employer no longer wanted to be bound by one or two of the essential terms of the contract of employment, unfortunately he had failed to apply the "contract test"
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correctly, overlooking the cumulative impact of the second respondent's actions, including forced leave, reassignment of duties and ambiguity about the appellant's employment status. The learned judge had limited its review to procedural propriety and did not address the substantive issues of the Industrial Court's findings.

F
Ground 3: Findings Of Fact

[64] The appellant submitted that the High Court erred in law by improperly deferring to the Industrial Court's findings of fact, particularly in relation to the credibility of the second respondent's witness (COW10) and the evaluation of evidence. While judicial deference to a tribunal's findings
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is warranted in certain circumstances, it does not absolve the reviewing court from scrutinising whether the findings are supported by evidence and logic. The High Court's failure to conduct such scrutiny renders its decision unsustainable.

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[65] In our considered view, there were contradiction in the second respondent's witness' (COW1) testimony, where COW1, on the other hand, testified about reserving the right to transfer the appellant within the group, of companies, but on the other hand, COW1 stated that the appellant remained the head of training at all material times. These statements are inconsistent, as the assertion of an active transfer process undermines the
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claim that the appellant's position was secure. The Industrial Court failed to reconcile these contradictions, yet the High Court uncritically affirmed its findings. Thus, there is insufficient judicial appreciation of the evidence by the learned judge, which justified us to interfere with his findings.

Ground 4: Delay In Resignation

[66] The Court of Appeal in *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197; [1998] 2 MLJ 599 held that for an employee to be successful in his claim for constructive dismissal, among other factors, the employee must not occasion any delay in terminating the contract with the employer, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

[67] In *Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor* [2017] 8 CLJ 159, the Court of Appeal through the judgment delivered by Mohd Zawawi Salleh JCA (as he then was) held as follows:

> [29] ... In our view, the first respondent's delay of approximately five months in leaving employment goes to show that there was never any conduct by the appellants which rendered continued employment impossible, unreasonable and unbearable as alleged by the first respondent.
>
> [30] It is trite that in a claim for constructive dismissal, it is imperative for the employee to take immediate steps in walking out of his employment within a reasonable time after the alleged breach of contract, failing which the employer will be deemed to have waived the breach and agreed to vary the contract.

[68] In *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 QB 761, 769C, Lord Denning said that employee "must make up his mind soon after the conduct which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

[69] In *Joseph v. Rey Lenferna Ltd* [2008] SCJ 342, the employee had been the manager of a department with responsibility for sales, marketing and administration as well as technical aspects, but, after a takeover of another company, a co-manager was appointed in respect of the former aspects, while his activity was limited to the technical. It was found on the facts that he had accepted the change without protest and had worked for a month, before deciding to leave and found his own company. His claim for constructive dismissal was dismissed. The Supreme Court said that:

> In a case of constructive dismissal, the employee's response to the employer's conduct is an important factor. The employee must be careful that his response does not imply a willingness to accept the new conditions. He must not stay on in circumstances which imply that he does not regard his employer's conduct as entitling him to terminate his contract of employment.

[70] The appellant argued that the High Court erred in law and fact by affirming the Industrial Court's finding of undue delay in the appellant treating himself as constructively dismissed. This finding overlooked the

A appellant's reasonable steps to resolve the issue and misapplied the principles of constructive dismissal, which allow for a measured and appropriate response to an employer's breach.

[71] The learned judge upheld the finding of the Industrial Court that there was undue delay in the appellant leaving his employment after alleging that B the second respondent indicated an intention to dismiss him from his employment (see the appellant's letter dated 23 October 2017 at pp. 569 and 570, record of appeal vol. 2(3), where the appellant required the second respondent to respond within three days from the date of his letter.

C **[72]** For ease of reference, the appellant's letter dated 23 October 2017 is reproduced below:

> My Ref: PERSONAL/EMPLY/2017/10
>
> Capt Sudhir A K Kumaren 138, Jalan Tanjung Aru,
> Malaus Aru 88100 Kota Kinabalu Sabah
> D 23rd Oct 2017
> The Managing Director,
> Layang-Layang Helicopter Academy Sdn Bhd, Terminal 2, KKIA Old Airport Road, Tanjung Aru,
> 88100 KOTA KINABALU Sabah Malaysia
>
> E ATTN - JOHAN POONG ABDULLAH
>
> Dear Sir,
>
> Request For The Original Copy Of Board Of Directors' Directive Concerning Annual Leave And Other Matters
>
> F 1. Refer to the above matter and to 2 (two) Whatsapp images sent by N. Thiruchelvam's mobile no +6012 802 9000 on 15th Oct 2017 at 12:31 and 12:56 respectively.
>
> 2. The aforesaid Whatsapp images are not visibly clear and therefore I would be grateful if you could furnish me with the "ORIGINAL" copy of the said directive as well as a copy of Staff Notice No 12/49 dated
> G 12* December 2012 which is referred to in the subject matter of the said directive.
>
> 3. Further and in addition, notwithstanding the content of the directive to take annual leave from Layang-Layang Helicopter Academy Sdn Bhd (LLHA). I would like to record the following:
>
> H (a) the directive to hand over the company assets such as the company vehicle, computer, office keys and intellectual properties is not an accepted or usual practice when going on leave;
>
> (b) I have been instructed not to give any Instructions to Staff or students while on leave and have been barred from going online to
> I check the student online training programmes and progress which is again not an accepted or usual practice when going on leave; and.

(c) the statement that my future employment with Layang-Layang Aerospace Sdn Bhd ("LLASB") will be deliberated by the Board of Directors when for all intents and purposes my employment contract dated 30.06.2014 is with LLHA and not with LLASB.

4. Hence, as a result of the combination of items 3a, 3b and 3c above indicates to me an intention by LLHA to dismiss/remove me from my employment.

5. In light of the aforementioned matters, I would be grateful for your confirmation in writing that I would be employed by LLHA upon my return from the annual leave that I have been directed to take.

6. I look forward to your favourable response to this letter within 3 (three) days from today.

7. In the meantime, I reserve all my rights accordingly. Kindly acknowledge receipt on the duplicate copy of this letter.

Yours Faithfully
Captsudhir A K Kumaren

[73] It was the learned judge's finding at paras. [40] and [41] of the judgment that:

[40] If the applicant really or honestly believed as he stated in his letter that he was constructively dismissed by the second Respondent or that the second Respondent intended not to be bound by the essential terms of the contract of employment thereby committed a repudiary breach then, he did not choose to accept the repudiatory breach and terminate his employment immediately and even immediately after the dateline he set to require the second Respondent to respond I think a reasonable trier of facts would ask why didn't the applicant do so in the circumstances.

[41] Instead the applicant only informed the second Respondent after about a month later and by his letter dated 13th November 2017 by which the applicant stated that he considered himself constructively terminated but not because of the requirements of the second Respondent which the applicant said forced upon him to go on leave by the second Respondent's letter dated 13th October 2017 but for a different reason, that was the second Respondent had failed to confirm his position as the Head of Training of the second Respondent.

[42] By putting up another different reasons on the failure of the second Respondent to respond and confirm his existing position in his employment with the second Respondent, it is not unreasonable to deduce that the applicant had never considered the actions of the second Respondent in asking him to go on leave and the matters relating thereto as amounting to the second Respondent committing a fundamental breach of the contract of employment or amounting to dismissing him constructively.

[43] In the circumstances, in my judgment, it cannot be said that the finding of the first Respondent that there was undue delay on the part of the applicant in terminating the contract of employment following

A constructive dismissal as the applicant asserted, is so outrageous or unreasonable that no reasonable trier of facts similarly circumscribed by the evidential materials before him/her would have made such a finding.

See: *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p. 97; *Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor* [2017] 8 CLJ 159; *Malayan Banking Berhad v. Marcus Wong & Anor* [2015] MLJU 1965 and *Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor* [1998] MLJU 83.

[74] The Industrial Court concluded that the appellant delayed unduly by resigning on 13 November 2017, one month after the second respondent's letter dated 13 October 2017. However, in our view, this finding ignored the fact that the appellant issued a clarification letter on 23 October 2017, seeking confirmation of his employment status and waited for a response before resigning.

[75] The second respondent, however, contended that the appellant, claiming constructive dismissal, should have acted in all reasonable haste in walking out of his employment. He must exit his employment after having given due notice to the second respondent of its breach of fundamental terms of his employment contract and the breach remains unremedied.

[76] As said, it has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'. (See *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 and *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1988] 1 MLJ 92 at p. 94).

[77] The 23 October 2017 letter explicitly requested the second respondent to confirm the appellant's continued employment. The appellant acted reasonably by giving the second respondent three days to respond. When no response was received, the appellant resigned on 13 November 2017. These actions demonstrate that the appellant was not unreasonably delaying his resignation but was attempting to resolve the matter amicably.

[78] The Industrial Court failed to appreciate that the second respondent's non-response to the clarification letter evinced an intention to repudiate the contract. This failure to respond directly influenced the appellant's decision to resign and cannot be used to penalise him for the alleged delay. The learned judge failed to address the appellant's reasonable conduct and erroneously affirmed the Industrial Court's finding of undue delay.

[79] The resignation was directly linked to the second respondent's non-response, which confirmed the appellant's perception that the second respondent no longer intended to be bound by the employment contract.

[80] In *Malayan Banking Berhad v. Marcus Wong & Anor* (*supra*), the High Court held as follows:

> In my opinion, the learned Chairman did not give adequate consideration to the question of delay in this case. This is not a matter of discretion that is vested in the Industrial Court. It is a matter of law that an employee who considers himself or herself constructively dismissed should act with promptness. In the well-known cases of *Western Excavating (ECC) Ltd. v. Sharp* [1978] 1 All ER 713, Lord Denning MR said as follows:
>
> > Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the (varied) contract.
>
> The facts relating to delay are not disputed. After getting the first transfer order on 19th October 2012, the first respondent did not complain until 4th December 2012. After he was given the second transfer order on 14th December 2012, he waited another ten days before complaining or giving notice of constructive dismissal. His complain pertains to removal from his former position before being given the first transfer order, *ie*, as Head of SME, Business Centre in Karamunsing. Therefore, considering the fact that his complaint is not about removal from the post he held before the second transfer order but the first transfer order, the ten days' delay is by any reckoning a lengthy delay. In fact, there should not be a technical calculation that there was a mere ten days' delay from the date of the second transfer order. This is because throughout his judgment, the learned Chairman considered the "cumulative effect" of the two transfer orders and the intention evinced by the applicant not to be bound by the contract of employment. And as I noted earlier, the real complaint is not about the loss of the post held by the first respondent between the two transfer orders but about the loss of the post he held before the first transfer order as the Head of SME Business at Karamunsing.
>
> Therefore, the lengthy delay from date of the first transfer order should have been considered by the Chairman. His failure to do so is an error of law. However, even after the second transfer order was given, the first respondent did not complain immediately but waited again for ten days to elapse before giving notice of constructive dismissal. By then, he had even attended a meeting with Head, Business Banking - Region Sabah about his new responsibilities. Therefore, the ground of delay has merit and, on this ground, alone the award must be quashed as the Chairman failed to properly take it into consideration. I shall now proceed to consider the other grounds raised by the applicant.

[81] In light of what had transpired, we found that there was no delay in the appellant leaving his employment after alleging breach by the second respondent. The delay was caused by the second respondent's failure to

respond to the appellant's letter, which left the appellant with no option but to resign after waiting for a reasonable period of time. Hence, there is a cause for the appellant to complain.

Ground 5: Limits On Transfer Rights

[82] Learned counsel for the appellant vehemently argued that the High Court erred in law and fact by affirming the Industrial Court's finding that the issue of limits on the second respondent's right to transfer or re-designate the appellant did not arise. The High Court overlooked evidence indicating the second respondent's intention to transfer or re-designate the appellant, which was central to the claim of constructive dismissal. This failure to address the issue reflects a misdirection on the part of both the Industrial Court and the High Court.

[83] In reply, learned counsel for the second respondent submitted that the Industrial Court and the High Court also did not find any merit in the appellant's contention that the Board of Directors will deliberate on the future of the appellant's employment with the parent company upon his return from his leave constituted a fundamental breach of the appellant's employment contract evincing an intention on the part of the second respondent to get rid of the appellant's from his employment. The learned judge also found that the said letter of 13 October 2017 only expressed an intention to transfer and that there was no evidence that the second respondent had decided to do so.

[84] With respect, we disagree with the above findings. In our view, the second respondent had exceeded its contractual rights by creating uncertainty and ambiguity about the appellant's position. Clause 15 of the appellant's employment contract allowed for re-assignment within the organisation. However, this right must be exercised reasonably and in good faith. The second respondent's conduct, including removing the appellant's duties without clear justification had breached this clause. The second respondent's failure to provide clear communication about the appellant's role constituted a breach of trust and confidence.

[85] The constructive dismissal raised by the appellant is not a mere assumption, speculative in nature, vague or without concrete evidence. The appellant has successfully discharged the onus on him to prove that there was a breach of the employment contract by the second respondent, which goes to the root of the contract.

Conclusion

[86] Upon deliberation, we find that there is an appealable error in the findings of the learned High Court Judge in affirming the decision of the learned Industrial Court Chairman. From the facts, we find that the conduct of the second respondent in enforcing the appellant to take leave and return all the respondent's properties tantamount to constructive dismissal. We consider the second respondent's conduct to be unreasonable.

[87] For the aforesaid reasons, we unanimously find merits on the appellant's appeal, allow it and set aside the High Court's order that affirmed the Industrial Court's decision.

[88] Regarding the prayers for reinstatement sought by the appellant, we find that such order is not suitable in this case, given the circumstances of the appellant's employment with the second respondent. We order the payment of backwages and compensation to be assessed by the first respondent, and the amount is to be paid to the appellant by the second respondent.

[89] The case to be remitted to the Industrial Court for assessment. Costs of RM20,000 here and below to be paid to the appellant, subject to allocatur fees.